[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

July 21, 1939.

PUBLIC PROSECUTOR v. LOKE KWI THONG.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 43 of 1939]

Sanitary Boards Enactment (Cap. 137) s. 17 (ii) —Sanitary Board By-Laws (Gazette Notification No. 3797 of 1935) Part VII, By-Law No. 7A—operating a gramophone—nuisance—validity of by-law.

Any person who operates a gramophone for the production of music in such a manner as to constitute a nuisance commits a breach of By-Law 7A Part VII of the Sanitary Board By-Laws (Gazette Notification No. 3797 of 1935) and is liable to be punished under Section 17 (ii) of the Sanitary Boards Enactment (Cap. 137).

Loke Kwi Thong v. Public Prosecutor, (1931–1932) F.M.S.L.R. 337, 2 M.L.J. 20 distinguished.

MAGISTRATE'S CRIMINAL APPEAL.

The Respondent was charged on the 25th May, 1939, with operating a gramophone for the production of music in such a manner as to constitute a nuisance and thereby committing a breach of By-law 7A Part VII of the Sanitary Board By-laws (Gazette Notification 3797 of 1935) punishable under section 17 (ii) of the Sanitary Boards Enactment (Cap. 137).

When the charge was read and explained to him he pleaded guilty and also stated that at the time in question a customer wanted to buy a gramophone in his shop and as the five foot square room was too small for the testing of the gramophone the machine was tested in the shop.

The Magistrate adjourned the case to the 1st June 1939 for judgment and on that day he stated that he did not accept the plea of guilty and he discharged the Respondent. In his grounds of judgment he relied upon a passage from the judgment of Thorne Ag. C.J. F.M.S., in *Loke Kui Thong v. Public Prosecutor*, (1931–1932) F.M.S.L.R. 337; 2 M.L.J. 20 which is as follows:—

> "In the case of a dealer in gramophones a First Class Magistrate has no power to make an order against him prohibiting him from making a noise by means of loud speakers and gramophones in the course of his trade in selling such instruments".

The Public Prosecutor appealed against this judgment on the ground that the case quoted by the Magistrate had no bearing on the present case as those proceedings were instituted under the Criminal Procedure Code whereas the present charge was under the Sanitary Board By-laws. The law is explicit and the Respondent should have been convicted.

After hearing the arguments on the 17th July, 1939, judgment was reserved. On 21st July, 1939, the Chief Justice allowed the appeal and accused was convicted and fined $1/- or 3 days R.I.

A. J. Grattan-Bellew, Ag. Deputy Legal Adviser, for Public Prosecutor.

A. K. Sen for Respondent.

Poyser, C.J.—This is an appeal by the Public Prosecutor. The respondent was, on the 25th of May 1939, charged with contravening the provisions of a by-law (Part VII 7A) made by the Kuala Lumpur Sanitary Board under the powers granted to them by the Sanitary Boards Enactment (Cap. 137). The material part of this by-law is as follows:—

> "No person shall operate or cause or suffer to operate in any street or public place or in any building or place which adjoins any street or public place any gramophone or wireless loud speaker or any other instrument whatsoever for the production of noise or music in such a manner as to constitute a nuisance".

The charge was read and explained to the respondent, and he pleaded guilty. The Magistrate deferred judgment to the 1st of June, and then discharged the respondent, as he was of the opinion that no offence had been committed. The Magistrate in coming to this conclusion thought that he was bound by a decision of Thorne Ag. C.J. in *Loke Kwi Thong v. Public Prosecutor,* 1931–32 F.M.S.L.R., 337; 2 M.L.J. 20. In that case it was held that a First Class Magistrate has no power, under the provisions of the Criminal Procedure Code, to make an order prohibiting a dealer in gramophones from making a noise by means of gramophones in the course of his trade. That case, however, is only an authority in regard to the provisions of Chapter IX of the Criminal Procedure Code in respect of Public Nuisances—it is no authority in regard to the interpretation of by-laws made by a Sanitary Board.

It was argued on behalf of the respondent that the by-law in question was invalid by reason of its uncertainty and unreasonableness. Two cases were cited in support of this argument, viz: *Kruse v. Johnson,* (1898) 2 Q.B. 91, and *Gentel v. Rapps,* (1902) 1 K.B. 160. In the former of these cases it was held that a Court could hold that a by-law was void for unreasonableness or unfairness but should be slow to do so. In the latter case it was held that a by-law which prohibited the use of offensive and obscene language was valid although it did not contain such words as "so as to be a nuisance or annoyance to others".

Neither of these cases, however, support the argument on behalf of the respondent. To prohibit the use of loud speakers and gramophones in close proximity to offices and business premises does not appear unreasonable or unfair; and further, I see no uncertainty in regard to this by-law. Nuisance is not defined, but it has a well known meaning in law and, so far as this by-law is concerned, may be defined as

> "an inconvenience materially interfering with the ordinary comfort physically of human existence. (Walker v. Selfe, 20 L.J. Ch. 435)".

For the above reasons it is clear that this appeal must succeed. The Magistrate should have inflicted some penalty on the respondent after the latter had pleaded guilty.

The only doubt I had in this case was to decide in what form the appeal should be allowed, for there was no material on the record to indicate the seriousness or otherwise of the offence. To order a new trial in view of the respondent's plea would be most inappropriate, and it appears unnecessary to send the case back to the Magistrate with directions to record a conviction.

Taking all the circumstances into account, I think the proper order to make is to find the respondent guilty of the offence with which he is charged, and to inflict a fine of one dollar or in default 3 days rigorous imprisonment. I impose a nominal fine for, as previously stated, there is nothing in the record to indicate that the respondent habitually disregarded the provisions of the by-law in question, or did so after complaints had been made.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) AND GORDON-SMITH, Ag. J.A. (MALAYA).

August 22, 1939.

LIEW NGUN YIN (f) Plaintiff (Respondent)

v.

LEE PAK YIN
LIM SENG FOOK } **Defendants (Appellants)**

LIEW NYUN YIN (f) Defendant (Respondent)

[PERAK CIVIL APPEAL No. 6 of 1939]

[PERAK CIVIL SUIT No. 86 of 1939]

Partnership — interim Receiver — continuance of appointment of, until trial or further order.

To support an application in a partnership action for the continuance of the appointment of an interim receiver until trial or further order, substantial grounds must be shown to have existed for the continuance and the dissolution of the partnership by reason of the death of a partner or the subsistence of that partnership or the creation of a new partnership is not one of such grounds.

APPEAL from the order of Murray-Aynsley, J. dated the 13th June, 1939.

By an agreement dated 14th day of April 1935 Lim Seng Chew, Lim Siew Yin (the plaintiff), Liew Ngun Yin, the 3rd defendant and Lee Pak Yin, the 1st defendant, agreed to become partners in the firm of Kim Yin Mining Kongsi. Lim Seng Chew held largest number of the shares and, prior to his death, he was the Managing Partner of the firm. He died on the 25th November 1937. The 1st and 2nd defendants were the executors under his Will. The plaintiff was the widow and residuary legatee under the Will of the said deceased. The 3rd defendant was the plaintiff's sister and the wife of the 1st defendant. On the 24th April 1939 the plaintiff commenced this Suit claiming (1) a declaration that the partnership was dissolved as on the death of the said Lim Seng Chew, or, alternatively, an order decreeing a dissolution of the partnership, (2) a winding-up order, (3) appointment of a receiver and other consequential relief. On the 1st of May 1939 the plaintiff moved for an order appointing an interim receiver. The Motion was heard *ex-parte* by Terrell, J. and an order was made appointing Mr. Yeoh Cheang Kang to be interim receiver and manager of the business of the Kongsi. By the said order it was further ordered that notice thereof be given to the defendants and that notice of Motion be served on the defendants returnable on the 8th of May. The order was made on the ground set out in paragraph 6 of the plaintiff's supporting affidavit of the 1st of May that "since the institution of this suit defendant No. 1 has, I am informed and verily believe, stopped mining operation and the mine is in danger of being flooded." Thereafter several affidavits were filed on behalf of the defendants to the effect that the danger apprehended by the plaintiff was non-existent. The plaintiff filed an affidavit, not in reply to the allegations contained in the affidavits above mentioned, but setting out complaints against the 1st and 2nd defendants regarding their management of the accounts of the Kongsi. The matter came on for hearing before Murray-Aynsley, J. on the 13th June and the learned Judge made an order continuing the appointment of the Interim Receiver and Manager. Against this Order the 1st and 2nd Defendants appealed.

Braddell (*Ramani* with him) for Appellants.